2001

State of Utah v. Style Crete, Inc : Brief of Respondent

Utah Supreme Court

SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

STYLE CRETE, INC., a Utah corporation,
Defendant and Respondent.

Case No. 10902

BRIEF OF RESPONDENT

Appeal from Order of Third District Court
for Salt Lake County
Honorable Marcellus K. Snow, District Judge

ROBERT S. CAMPBELL, JR.,
520 Kearns Building,
Salt Lake City, Utah,
PAUL E. REIMANN,
500 Kennecott Building,
Salt Lake City, Utah,
Attorneys for Respondent, Style Crete, Inc.

PHIL L. HANSEN,
Attorney General,
BRYCE E. ROE,
Special Assistant Attorney General,
510 American Oil Building,
Salt Lake City, Utah,
Attorneys for Appellant, State Road Commission.

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NATURE OF CASE

Complaints in condemnation were filed by the State Road Commission in late 1965 and early 1966 to acquire the property of Style Crete, Inc. (hereafter referred to as "Style-Crete") for the relocation of the main line track of the Western Pacific Railroad and for the construction of a new highway known as 2300 West Street in Salt Lake City. Both acquisitions were incident to the development of the Interstate Highway System in westerly Salt Lake City.

DISPOSITION OF CASE IN LOWER COURT

The law issues as to the right of condemnation, public use and necessity, and other jurisdictional prerequisites were admitted in the Commission's favor. The cases were

thereafter consolidated for joint trial on the questions of just compensation (R. 13, 121-122). A special jury venire was impaneled and the hearing on value and damages commenced on March 13, 1967. After 8 days of trial, the jury returned into open court special interrogatories which found the difference between the value of the total property *before* condemnation and the value of the remaining property *after* condemnation in the sum of $122,500.00. Judgment on the interrogatories was thereafter entered by the trial Court (R. 91-94).

The Commission's Motion for a New Trial was denied on April 27, 1967 (R. 95, 99-100).

MAP OF SUBJECT PROPERTY AND TAKING

Attached as Appendix 1 herein is a reproduction of trial Exhibit D-1 illustrative of the Style-Crete property on the base sheet, the expansion plans of Style-Crete on overlay #1, and the course and alignment of the two condemnation takings on overlay #2. The Western Pacific acquisition is shown as it cuts through the property in an east-west direction directly in front of the industrial plant, and the 2300 West acquisition as it courses the property east of the plant, south to north.

STATEMENT OF FACTS

While some parts of Appellant's Statement of Facts recount accurately the events of trial, in the main it does not. Appellant's Statement (pp. 2-12 of its Brief) is substantially misleading, inaccurate in context and violative

of several long-established principles — it offends the rule that the facts shall be presented in a light which most favorably support the findings and verdict of the jury, it fails to set out the substantial evidence of both parties and the admissions made by the State's value witness, and the Statement is argumentative rather than factual in nature. Indeed, the Statement on pages 8, 10-12 of the State's Brief partakes of jury argument on the weight of the testimony. As a result, Respondent will herein make its own statement of the facts of trial, bearing in mind the admonition of Rule 75(p), U. R. C. P.

1. **Property Before Condemnation.**

The property was situated in the general industrial area between 2200-2400 West on the north side of 5th South Street in Salt Lake City (Ex. D-1). Of irregular shape, flat in slope and of fair drainage, the property was comprised of 14.26 acres. Access and frontage of better than 63 feet were afforded directly from 5th South Street (R. 180, 647).

The property was used for the manufacture of pre-cast stone products, all phases of fabrication being carried out in a specially designed building located at the west front section of the premises (R. 252, Ex. D-1). Comprising 17,000 square feet and constructed of steel beams and joists, reinforced, double load-bearing walls, cement flooring and stone walls, the building was built in several phases from 1958 through 1962 as business conditions warranted, at a cost of $110,000.00 (R. 246-254, 359-360, 365-369). Upon the advice of McCown E. Hunt, a structural and design engineer, the building was built so that raw materials would

pass from front to rear (or south to north) in the manufacturing process. The economic and functional utility of the building, itself, was dependent upon continuity of the south to north process (R. 396-401, 439, 441, 496, 497).

There being no sewer in the area, sanitation was provided by a Board of Health approved septic tank and drain field within the Style-Crete property, located southeast of the manufacturing plant and beneath the customer parking area (R. 506-512).

The critical phase of the manufacturing process occurred at the south end of the building in the "casting section". After the aggregate was mixed, transported by crane, and poured into specially constructed molds of required size, the cast stone underwent controlled vibration to insure uniformity and removal of air bubbles (R. 384-395, 444-447). After the stone began to set up and cure during the "green period," it was imperative that the molds be not thereafter subject to uncontrolled or foreign ground movement and vibration R. 444-447). The Engineer Hunt, Architect Budd and the owner all testified to the exacting specifications for cast stone (R. 384-395, 444-447, 475-479). The average thickness of cast stone slabs is 2¼ inches (R. 388). The required tolerances are 1/16 inch or less for panels 5 feet wide and 13 feet long (R. 475-476). Vibration during the "green period" could result in warping or cracking. The cast stone manufactured by Style-Crete was as large as 56 feet long, 4 feet wide 1 foot thick and weighed 20 tons (R. 255). Hunt and Budd further testified that in addition to the close manufacturing tolerances of cast stone, uncon-

trolled vibrations during the early curing stage or "green period" would impair its structural strength (R. 444-447, 481).

The front of the property had site prominence and full view from 5th South Street, while the conglomerate and congested section of the plant in the rear was removed from public and customer observation (R. 595-598). At the date of condemnation, Style-Crete had planned and secured a building permit to construct the final phase of the industrial plant, enlargement of the engineering offices and expansion of the entrance and parking facilities (R. 371-374, D-1 Overlay #1).

The property had functioned as a fully operable cast stone manufacturing plant for several years and the testimony was unequivocal from every witness qualified to speak on the subject, both for Style-Crete and the State, that the highest and best use of the subject property was the use actually made, i.e., a cast stone industrial site (R. 570-573, 710).

The market value of the land and building was evaluated by the witnesses for both parties under accepted standards, cost replacement less depreciation of the building, and market comparison on the land (R. 549, 582-594, 710-726). For the landowner, B. Luc Bettilyon of Bettilyon Construction Company testified that the cost to construct the manufacturing building new in 1966 was $123,322.00. Applying to that sum a factor for estimated depreciation, the landowner's appraisal expert, Ray A. Williams, testified that the depreciated value of the building was $111,787.00 (R.

590). Based on comparable sales, Williams determined the market value of the land to be $5,000.00 per acre or $71,-325.00 for the 14.26 acres. His total appraisal was $183,-000.00 (R. 590-594, Ex. D-25). C. Francis Solomon, appraiser called by the State, opined that the depreciated value of the building before the taking plus the value of the land, itself was $184,600.00 (R. 726). The expert testimony of both parties produced little conflict as to the fair market value of the total property before condemnation. In fact, the appraisal of the State's witness was nearly $1500.00 higher than that of Style-Crete's witness, Williams.

2. Nature of Condemnation Taking by State.

The two acquisitions of the State were:

Railroad taking. The Western Pacific right of way cut across the front portion of the Style-Crete property east-west, 100 feet in width and on a dirt and rock fill of 8 to 9 feet in heighth (R. 189-195, Ex. D-1). Fully fenced on both sides and in front of the Style-Crete building as well, it did not permit access crossing except at 2300 West Street (R. 199-201). Normal water drainage conduits along the right of way were not provided (R. 211). The north edge of the right of way came within 9 to 10 feet of the Southwest corner of the manufacturing building (R. 189), the center of the tracks being 80 feet from the casting tables in the plant (R. 304-305). The W. P. trainmaster testified that the track would be used by 12 trains daily, 5 heavy freights in each direction and one passenger train each

way (R. 225). The trains would reach speeds of 60 to 80 miles per hour in the Style-Crete area (R. 228-229), and the freights would average 80 to 100 cars with a gross weight of 5,000 tons (R. 226-227).

Highway Taking. The 2300 West acquisition was 80 feet in width and coursed through the property south to north (R. 181, 204). On a continuous dirt fill 3 to 9 feet, its sloped embankments prohibited direct access from the remaining Style-Crete property, save at a point north of the plant (R. 729). No provisions were made by the Highway Department for drainage or water collection ditches on either side of the highway (R. 207).

The total acreage taken from the owner was 1.999, .41 acre for the railroad and 1.58 acres for the highway.

3. Testimony on Remaining Property After Condemnation.

It was with respect to the effect of the two partial-takings upon the highest and best use and the value of the remaining property of Style-Crete that the expert testimony was at odds. Style-Crete called six witnesses on the subject and the Highway Department called 3 witnesses. Regarding best use and value *after* condemnation, the witnesses of Style-Crete variously took stock of the following factors:

(a) The building was placed in a depressed corner, locked in by a nine foot high railroad right of way 11 feet distant on the south and by a nine foot high roadway immediately on the east (R. 194, 378, 670, D-1). The two acquisitions had produced a pincer or scis-

sors effect on the plant and its remaining use, blocking all front entrances and access from 5th South Street, removing all employee and customer parking, preventing any feasible use of the south and east sides of the building, and restricting use of the storage yards on the east (R. 402-404, 496, 497, 509-602). Hunt testified that all reasonable access to the office, engineering room and the display areas for customers had been eliminated by the takings, and that the critical aggregate storage area was cut off by the 2300 West fill. The architect, Budd, said that customers cannot get to the plant without going through the rear end (R. 448-451, 496-497).

(b) *Vibration.* It was the opinion of two engineering experts and an architect that the probabilities were such that the ground vibration caused by the freight trains on the W. P. track in front of the remaining building would unreasonably jeopardize the structural soundness and tolerance requirements of the cast stone process in the building. The leading witness, Mr. Leeds, gave empirical as well as opinion evidence of vibration damage. One of a half dozen qualified engineering seismologists in the U. S. (R. 300), Leeds had not only measured, but had evaluated the nature, strength, source and effect of all types of ground movement, trains, freeways, earthquakes, missile firings, etc., throughout the world (R. 283-292). He had monitored and evaluated the effect of passing railroad trains upon concrete structures at various industrial facili-

ties in the country (R. 293-300). Leeds made actual recordings of ground vibration on the old W. P. and the existent U. P. lines 80 feet distant from center track. By soil analysis, ground geology at the monitoring points were determined to be uniform with soil conditions of Style-Crete. Applying the vibration factor actually measured to the remaining property of Style-Crete, Leeds opined that the ground movement would "possibly cause damage to the curing concrete in the initial stages to a degree that incipient hidden damage might be sustained" (R. 301-320). Furthermore, Mr. Leeds was of the judgment that the building could not be used for any industrial use requiring precision work (R. 322-331).

McCown E. Hunt, having written substantial specifications for cast stone and having designed several cast stone plants (R. 435, 436-444), was of the judgment that the railroad vibration would substantially affect the stability of a cast stone product were an attempt made to manufacture after condemnation (R. 445-447).

Mr. Budd testified of the need for exactness in cast stone fabrication and the critical points of setting up and curing of the initial concrete molds (R. 474-476). He, too, had prepared substantial specifications for cast stone products on large commercial buildings. Whereas the Style-Crete plant had been a competent manufacturing facility prior to condemnation, Budd was of the judgment that by reason of the vibration

and scissor influence of the two takings, the remaining building was no longer functional as such. As an architect, he would not accept the products of such a plant (R. 476-485).

(c) *Water Ponding.* After construction of the railroad and highway, substantial ponding of water occurred in the pocket created along the railroad and highway immediately south and east of the building (R. 508-510, 527). Lack of drainage facilities in the condemned area kept the water impounded and made it impractical to move equipment in the area or to store materials (R. 428-430, 451-453). Style-Crete had experienced no such ponding problems before condemnation (R. 432).

(d) *Sanitation.* The compacted railroad dike had knocked out the septic tank system and drainage field of Style-Crete (R. 451-453). The assistant sanitary engineer for Salt Lake City, A. R. Cardwell, stated that in his judgment, a feasible and adequate septic tank system for industrial use, could not be relocated at other points on the Style-Crete property after condemnation due to soil conditions and water table (R. 506-512, Ex. D-22). The State, on page 12 of its Statement of Facts, argues that the testimony of Mr. Cardwell on the loss of the building's sanitation facility, was of "doubtful weight.[1]

[1]Significantly, the State offered no testimony, whatsoever, at trial to meet the evidence of sanitation damage, and the testimony of Cardwell stood before the jury and stands before this Court uncontroverted.

(e) The combination of the two takings created a physical severance of the remainder into three independent tracts (Ex. D-1, R. 182-183). The integrity of the property was ruptured by the condemnation and little relationship remained between the divorced pieces. Particularly was this so with respect to the small triangle of .53 acre left south of the railroad which now only had value for speculation (R. 668).

(f) *Best Use and Value.* Because of one or more of the foregoing, it was the opinion of all expert witnesses, including Solomon for the State, that the building and remaining land no longer had as its highest use, that of a cast stone manufacturing plant. Hunt said that the building should be abandoned as a fabrication site because of the hazards of vibration and the proximate position of the plant up against the two takings (R. 448-451). Leeds concluded that vibration risks rendered the building of use only for dead storage (R. 322). The appraisers, Williams and Solomon, were in agreement that the vibration hazards were of sufficient consequence to the buyer and seller in the market so as to conclude that the property was no longer suited for cast stone or any other precision manufacturing use (R. 603, 729), but they differed in their judgments as to what reasonable use could be made of the building. On the one hand, Williams thought the building to be suited only for industrial storage (R. 668-675). Solomon, on the other hand, was of the opinion that the building could be used for light industrial and non-technical manufacturing (R. 827-828).

Having admitted that the vibration and close proximity of the railroad and 2300 West could destroy the functional utility of the building, Mr. Solomon was nevertheless of the judgment that the remaining building had a market value of $68,750.00 (R. 832). He acknowledged that if that building were to be constructed new and free from all the damaging effects of the railroad and 2300 West, its cost new would be only $77,380.00 (R. 834). He did not testify as to any comparable properties, sale or rental, in support of his $68,750.00 opinion. Mr. Williams determined the fair market value of the remaining building was $28,036.36 (R. 629), and as a basis, elicited several transactions involving comparable warehouse properties, sale and rental (R. 623-629).

(g) *Abandonment.* By reason of the condemnation suit, Style-Crete elected to abandon the building for further manufacturing and was in the process of so doing at the time of trial (R. 450-451). The owner testified that the proximity and effect of the railroad and highway made it economically impractical and unfeasible to reorganize or relocate sections of the plant within the building (R. 430-431).

4. Other Available Land Proffer of State.

At no other time in the trial did Style-Crete introduce or offer any testimony running to the claim that by reason of the amount and type of acreage under ownership, the total property, before condemnation, constituted an eco-

nomic unit dependent on its size for full value. Nor was it any part of Style-Crete's case that any such economic unit had been destroyed or damaged by reason of the physical loss of the *1.99* acres actually taken and shrinkage of the unit.

Nonetheless, the highway department during its case in chief, offered to show that as of December, 1965, there was available for sale by Arnold Machinery Company, *ten* acres of property on the immediate west of Style-Crete (R. 934). The proffer of State counsel, made out of hearing of the jury, represented that the Arnold property was land-locked without access, and that it was bounded "on the north by the old Western Pacific right-of-way" (R. 934). Appellant has, however, inserted as Appendix — Figure 3 in its Brief, a plat which would have the Arnold land abutting a city street on the north.[2] (See State's Brief p. 43.) The Court had previously denied several attempts of the State to raise the question during cross-examination of the witnesses for Style-Crete.

The State's proffer was denied by the Court on the ground that the availability of other land was not legally relevant under the facts of this case (R. 937). The State did not offer the sale of the Arnold land as a comparable sales transaction, although invited to do so by the trial Judge (R. 937). And Mr. Solomon, the State's only value witness, did not rely on the availability of neighbor-

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[2]Appendix 3 of Appellant's Brief is imaginary and styled to suit the State's intentions herein. Nothing resembling this drawing was tendered by the State to the trial Court. The Respondent moves that it be stricken and disregarded.

ing lands as a basis for his conclusions on either land value or severance damages.

5. Charge to the Jury and Verdict.

The trial Court included in its charge to the jury, either verbatim or in substance, 14 of the 15 requests for for instructions submitted by the State (R. 63-80). By answers to special interrogatories the jury found that the *after* value of the Style-Crete properties was $122,500.00 *less* than the value *before* the taking (R. 14). Judgment of just compensation was entered thereon on March 28, 1967 (R. 91-94). The motion for new trial filed by the State was denied April 27, 1967 (R. 95-96, 99-100).

POINT I.

THE TRIAL COURT WAS CORRECT IN REFUSING TO HEAR EVIDENCE OFFERED BY THE STATE AS TO THE AVAILABILITY OF ADJACENT PROPERTY FOR PURCHASE BY THE DEFENDANT STYLE-CRETE.

No issue is raised on this appeal that the evidence was insufficient to support the verdict. The State attempts to overthrow the verdict and judgment by particular errors of the trial Court, which are without substance. The nub of the State's appeal is stated in Points I through III of its Brief, that the trial Court erred in refusing the State's proffer which purportedly would show that Style-Crete could have "purchased as replacement land" ten acres of landlocked property from its next door neighbor on the

west. No issue of "availability of replacement land" was raised by the pleadings or incorporated within the pre-trial order (R. 121-123). Nevertheless, the State argues it here as a "triable issue" of severance damage. The answer to the State's claim lies in an understanding of the facts (which Respondent has set out in this Brief at some length) and of the nature of severance damages under consideration. Once digested, the facts dictate the application of the law and the conclusion that the State's proffer has no relevancy whatsoever to the issues of severance damage in this case.

1. Severance Damage Valuation in Eminent Domain is Governed By The "Before and After" Rule.

Art. I Sec. 22 of the State Constitution is declarative of the basic right to just compensation in eminent domain. The implementing statute, 78-34-10 U. C. A. 1953, provides for the measurement and payment of severance damage in the partial-condemnation of property:

> "Compensation and damages — How assessed. — The court, jury * * * must hear such legal evidence * * *, and thereupon must acertain and assess:
>
> "* * *
>
> "(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned *by reason of its severance from the portion sought to be condemned and the construction of the improvement* in the manner proposed by the plaintiff. * * *" (Italics added.)

In ascertaining what severance damage has been sustained, this Court has long held fast to the rule that the measuring rod of that damage is the difference in the value of the property *before* and *after* condemnation. *Stockdale* v. *Rio Grande W. R. Co. and Anheuser Busch Brewing Assoc.*, 28 Utah 201, 77 Pac. 849 (1904); *Telluride Power Co.* v. *Bruneau,* 41 Utah 4, 125 Pac. 399 (1912); *Weber Basin Conservancy Dist.* v. *Nelson,* 11 U. 2d 253, 358 P. 2d 81 (1960). In *State Road Comm.* v. *Ward,* 112 Utah 452, 189 P. 2d 113 (1948), Justice Pratt, for a unanimous Court, wrote of the definition:

> "The difference in the market value of the farm before and after condemnation does truly reflect that loss [severance damage] as presumably the difference will be founded upon the various changes incident to the proximity of the highway."

The Court has recently given further attention to the methodology of severance damage in the leading decisions of *State Road Comm.* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76 (1961) and *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963). In *Peterson,* it was said:

> "As to the error assigned in instructing on damages: notwithstanding the zealous efforts of counsel to torture them, we think they were such that the jury understood and applied the correct measure of damages: for the land actually taken: the fair cash market value on the date of condemnation; *and for severance damages to the remainder: the difference between its fair cash market value before and after the taking.*" (Emphasis added.)

And in *State Road Comm.* v. *Hansen, supra,* the rule remained constant:

> "The issue of severance damages was also correctly tried and submitted to the jury under a proper instruction that the owner was not limited to the value of the land taken, but was entitled to 'severance damages', that is, the difference in value of the remaining tract before and after the taking."

Thus, in a cadre of decisions, this Court has firmly implanted as the rule of damages in severance valuation, the difference between the fair market value of the property *before* condemnation and its fair market value *after* condemnation and the construction of the public work. Nor is there anything singular about the holdings of the Utah Court on the point. The "before and after rule" of severance damage valuation has been adopted overwhelmingly by the high court of practically every state of the Union. 4 *Nichols on Eminent Domain,* 528 Sec. 14.23, 5th ed.;[3] 27 *Am. Jur.* 2d 60 *Em. Dom.* 271.

In determining the diminution in the value of the remaining property caused by the partial-acquisition, all fac-

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[3]In applying the "before and after principle" the treatise writers suggest that the more logical and practical method is to determine the total just compensation to be paid by the difference between the value of the entire property before condemnation and the value of the remaining property after condemnation, rather than to determine merely severance damage to the remainder by its value before and after. 4 *Nichols on Eminent Domain* 547, Sec. 14.23 5th ed.; 1 *Orgel on Valuation under Eminent Domain* 251, Sec. 52 2d ed.

This criticism appears justified since it is a non-sequitur of sorts to evaluate the remaining property *before* condemnation, when in fact, there was no remaining property in existence before condemnation. The Utah cases are permissive of the suggested approach, and both parties herein proceeded on that basis in their testimony.

tors which reasonably tend to depreciate the remainder in the eyes of the buyer and seller in the open market may be taken into account. *Telluride Water Power* v. *Bruneau,* 41 Utah 4, 125 Pac. 399 (1912); 4 *Nichols on Eminent Domain* 555, Sec. 14.24 5th ed. and cases therein cited.

2. Exception to General Rule in the event that Severance Damage can be corrected by Replacement of Like Property.

The preeminent rule of the "before and after" of severance damage has its exception. If the severance damage which is sustained by the remaining property can be corrected through the substitution of similar property *to take the place of the property condemned,* the measure of damages may be the cost of acquiring the substitution or replacement property rather than the "before and after" formula.

This qualification of the general rule is interwoven within the precept of just compensation as defined in *State Road Comm.* v. *Noble,*[4] "that the owners must be put in as good a position money wise as they would have occupied had their property not been taken." If the severance damage to the remaining land can be cured by the purchase of similar and available land and if the purchase price for such land is less than the severance damage otherwise determined under the general rule of the "before and after", then the cost of such replacement would be an adequate measure of damage, for the landowner is thus put in "as good a position money wise" as he would have occupied prior to condemnation.

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[4]6 U. 2d 40, 305 P. 2d 495 (1957).

Even as an exception to the "before and after rule", the replacement theory of severance damage lacks general acceptance.[5] This Court has nonetheless recognized the application of the doctrine under restricted facts in two cases, *Provo River Water Users Assn.* v. *Carlson,* 103 Utah 93, 133 P. 2d 777 (1943) and *State Road Comm.* v. *Co-op Security Corp. of the L. D. S. Church,* 122 Utah 134, 247 P. 2d 269 (1952). And in two other decisions, *State Road Comm.* v. *Ward,* 112 Utah 452, 189 P. 2d 113 (1948) and *Southern Pacific Co.* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960), the Court refused to apply the replacement theory because of its irrelevancy to the facts. It is clear from those decisions that the "replacement rule" is atypical and applied only in the event that the appraisal of severance damages is premised on the claim that the *economic unit* of the total property has been damaged *by reason of the physical removal and loss of the actual property condemned.* If the land shrinkage of the economic unit can be cured by the substitution or replacement of property of equal production and utility and if such property is available for sale on the open market, *the cost to cure* or replace the condemned property is the measure of severance damage. That is the full import of the "replacement rule" and no more.

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[5]As the Appellant's Brief will admit, only two other jurisdictions, Missouri and Illinois, have recognized the doctrine. The last time the Illinois Supreme Court touched on the issue was in 1886, *Illinois and St. L. Co.* v. *Switzer,* 117 Ill. 399, 7 N. E. 664. The Missouri Court has mentioned it only twice, once in 1847 and again in 1917. *Hannibal* v. *Schaubacher,* 17 Mo. 582 (1847) and *City of St. Louis* v. *St. Louis S. R. Co.,* 272 Mo. 80 (1917). The leading treatise, Nichols on Eminent Domain, does not make any mention of the rule.

Thus in the case of first impression, *Provo River Water Users Assn.* v. *Carlson, supra,* it was claimed that the total dairy farm, although not contiguous, was one economic land unit, and that by reason of the condemnation for a reservoir of 18.75 acres of wild pasture, the remaining farm one and one-half miles away was all damaged uniformly because of the loss to the "dairy farm as a coordinated unit". For the Court, McDonough, J. noted there was no claim made that the remainder had been physically severed or cut, or left physically inoperable, or damaged due to proximity, location and/or use of the reservoir project:

> "In this case *there was no contention* that the erection of the reservoir and the relocation of the railroad tracks could in any manner injure any of the properties of defendant situated in the town of Charleston. *There was no proof offered to show that either the taking of the* 18.75 *acres for reservoir purposes, or the construction of the reservoir, could possibly result in any physical impairment* of the properties [remaining property] in Charleston" P. 99 of 103 Utah.

It was under these facts that this Court declared that if the 18.75 acres could be replaced by the purchase of other lands, the economic balance and size of the Carlson property would be restored and the owners damage would be thereupon cured:

> "If he could purchase other pasture land or farm land convertible into pasture, within a distance from his barns comparable to that of the condemned tract, and such other land would provide relatively the same kind of forage for the same number of

> cows or forage of equal ration-value throughout the seven months he used the wild pasture tract, it could not be contended that his properties in Charleston could be impaired or depreciated by taking the pasture. If another tract of *equal forage-producing value and conveniences could be substituted for the tract condemned,* whether larger or smaller in area, the defendant would be in relatively the same position he was in before the construction of the reservoir." P. 102 of 103 Utah.

In the subsequent case of *State Road Comm.* v. *Co-op Security Corporation of L. D. S. Church, supra,* the issue of severance damage was similar to that in *Carlson.* Before condemnation, the total property of the condemnee was comprised of two separate parcels used as a "dairy unit" of 100 cow capacity. It was contended by the owner that due to the removal and loss of the 7.89 acres condemned from one parcel, the available property on which feed could be raised was reduced "by about ten head with the result that the entire project was damaged at least 20%." As in *Carlson,* severance damage was predicated upon the loss to the economic unit by shrinkage of the total property size and not from factors normally associated with severance injury, vis., proximity and location of the public project, restriction of access, air, light and view and rendering the remainder physically unusable. The Court stated that under such facts, the availability of other land to replace that condemned was an issue properly to be raised:

> "If similar land to that taken was available on the date the summons was served, which could have been substituted for that condemned, it cannot be contended that the entire project was depreciated

> in value because it was made economically unfeasible because of lack of pasture land to graze a minimum number of dairy cattle. Under such a state of the record the opinion of experts as to the amounts the project was damaged was wholly immaterial and irrelevant. * * *
>
> "Since the evidence shows that this property could have been replaced there was no basis for the award of severance damage except as to the two small tracts. * * *" P. 140 of 122 Utah.

Wolfe, C. J. in concurrence, pointed out the limit of the replacement rule and the reason it was invoked in the case:

> "I concur. I desire to add, however, that when severance damages are sought, as in this case, because *the taking* of a part of a *farm has upset the economic balance of the farm* and thus has damaged that part of the farm not condemned, there must be proof that there are not available comparable lands which could be purchased by the condemnee *which would restore the economic balance of the farm.*"

Between the *Carlson* and *Co-op Security* decisions, *State Road Comm.* v. *Ward,* 112 Utah 452, 189 P. 2d 113 (1948) was decided. There the owners offered to show that in a partial-taking of their property, severance damage to a building should be based on the cost of replacement or restoring the improvement. This Court rejected the proffer in favor of the predominate rule that severance damages are determined by the difference in market value of the property before and after condemnation:

> "The restoration costs measure of damages is appropriate when such restoration costs *accurately* measure the decrease in the market value of the

> property damaged but not taken. * * * An effort to measure the effect of its removal simply by the cost of removal and its loss as a foundation as originally located does not truly reflect the depreciatory effect on the farm. The difference in market value of the farm before and after condemnation does truly reflect that loss, as presumably the difference will be founded upon the various changes incident to the proximity of the highway" P. 117 of 189 P. 2d.

The most recent case before this Court which raises the "replacement rule" is *Southern Pacific Co.* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960). The landowner's case on severance damage therein was hinged upon the depreciation in the value of the remaining property due to inadequate access, impossibility of use, and physical condition of the remainder, *all of which was caused by the design, location and construction of the railroad project.* No claim was made for damage from the loss of the condemned acreage or from the shrinkage of any economic land unit. The railroad contended that the trial court prejudicially erred in "submitting the question of severance damages to the jury because no competent evidence was produced that other similar lands were unavailable". This Court affirmed the trial court and held that the question of the availability of land to replace the condemned property was quite immaterial:

> "Under the above facts, evidence of the unavailability of other lands would be immaterial, because the damages to the remaining lands cannot be mitigated by obtaining other lands in other places which could serve in this unified operation the same pur-

> pose as the lands from which the sand and gravel was taken for the use to which the lands were suitable" P. 312 of 10 U. 2d.

Thus, this Court has left little to doubt in these four decisions that evidence as to the availability of replacement property may be shown in severance damage cases only if:

(1) The claim of severance damage stems from the removal and loss of property actually condemned causing a land shrinkage in a formerly balanced economic land unit;

(2) That the substituted property will be of the same functional use and will cure the severance damage.

3. The Replacement Rule was Totally Inapplicable in the Style-Crete Case.

The undisputed damage factors make it impossible to bring this case anywhere within the reach of the "replacement land" rule of *Carlson* and *Co-op Security*. The Style-Crete industry was in no sense comparable to a dairy farm. Style-Crete made no claim that the total land area was an economic unit dependent upon productive acreage. And Style-Crete did not claim damage due to shrinkage or reduction in size of land parcel. The attempt of counsel for the State to inject into the case a proffer of "available replacement land" was improper for several reasons. Firstly, the "available land" was subject to the same defects and disadvantages created by the State through condemnation and construction of the railroad, as did plague the Style-Crete property. It was a landlocked parcel with no access.

Secondly, the claims of severance damage of Style-Crete stem from the probable vibration of the railroad, the

"pincer" effect of the two public projects, inadequate drainage, physical and functional disutility of the building, slicing of the property into three separate parcels, proximity of the railroad and highway to the building (11 feet from the office area) and substantial impairment of access, air, view and site prominence. None of these damaged factors could in any way have been mitigated or cured by the acquiring of other "available ground". Indeed, Style-Crete could have purchased the neighboring Arnold Machinery land and *each and every other piece of industrial land in Salt Lake County for that matter, and it could not have cured in the slightest, these elements of damage which were occasioned by the location, proximity and design of the State acquisitions.*

The severance damage which evolved herein was of a category seen in *Southern Pacific* v. *Arthur* and *State Road Comm.* v. *Ward* and accordingly, the general rule of the "before and after" was the legal measurement. Had Style-Crete claimed that severance damage was caused by the removal and loss of the condemned 1.99 acreage and the consequent contraction of the remaining property, the State's proffer could have some merit since other available property would replace the land condemned and thus cure the severance damage. But that hypothesis is not of this case and it would have been flagrant and prejudicial error if the trial court had not rejected the irrelevant offer of proof of the State.

POINT II.

CASES CITED BY THE STATE ARE UNAUTHORITATIVE AND DO NOT SUPPORT

ITS CONTENTION THAT ITS PROFFER OF AVAILABLE LAND SHOULD HAVE BEEN ADMITTED BY THE TRIAL COURT.

The State's reservoir of case authority, on the admissibility of its proffer of available land to replace that condemned, is limited to five decisions. Two of those decisions are from intermediate courts and only one could be characterized as a recent view (1943, with the others being decided in 1847, 1886, 1900 and 1917). While they support the position of Style-Crete herein rather than that of the State, they deserve only limited attention in light of development of the Utah decisions.

In *Hannibal Bridge Co.* v. *Shaubacher,* 57 Mo. 582 (1847), *St. Louis* v. *St. Louis I. M. & S. R. Co.,* 196 S. W. 107 (Mo. 1917), and *St. Louis* v. *Paramount Shoe Mfg. Co.,* 168 S. W. 2d 149 (Mo. Ct. App. 1943), the cost of purchasing other land was found to fully cure the severance damage by restoring the economic unit and placing the owner in the same position as before. The rational expressed in *St. Louis* v. *St. Louis, I. M. & S. R. Co., supra,* is representative:

> "But in a case where the taking of a part of a tract which is devoted to a special use results in large depreciation in value for that special use, the measure of that depreciation ought to be the sum required to be expended in order to rehabilitate the property for such use *or replace the plant in statu quo ante capiendum; provided, of course, that rehabilitation in such manner be practicable.* * * * In cases where no available property is owned by

> him whose land is taken, the price at which other lands adjacent *equally as valuable intrinsically, as convenient, as economical in use, and as accessible,* and which can be bought, may be shown as measuring the amount of depreciation to which the lands damaged but not physically taken, have been subjected" P. 112 of 197 S. W.

The Missouri cases are irrelevant in this Appeal, since the purchase of neighboring land would not return Style-Crete to the status quo before condemnation. Nor is the case of *Illinois and St. L. R. Co.* v. *Switzer, et al.,* 117 Ill. 399 N. E. 664 (1886) germane since the owner there claimed the loss of water to a mill site. The acquisition of water from other sources would have cured the damage. And lastly, in *Gulf C. & S. F. R.* v. *Brugger,* 59 S. W. 56 (Tex. Civ. 1900), the condemnee urged that the balance of his economic unit of timber land had been damaged because of the removal or loss of the condemned property. The Texas Court held that the economic balance could be restored through the substitution of equal replacement property. The *Brugger* case is of no significance in the disposition of this appeal.

Thus it is that the State has not sited a single decision, treatise, or authority which would factually support the result of which it asks in this appeal. The insecurity of that position is matched by the rather celebrated fact that this appeal is the first time since the commencement of Interstate Highway acquisitions in 1956, where the State of Utah has sought to apply the replacement rule in a non-agricultural taking and under facts such as the case at bar.

POINT III.

THE STATE'S THEORY ON REPLACEMENT RULE OF SEVERANCE DAMAGE, AS SET OUT IN PLAINTIFF'S REQUESTED INSTRUCTION NO. 15, IS IMPOSSIBLE OF PRACTICAL APPLICATION.

As previously pointed out, the "replacement rule" has no application to the facts of this case where the State condemns two trips of land in opposite directions through the middle of an industrial operation. It was not entitled to an instruction on "replacement land". However, the lack of understanding which permeated the State's approach to severance damage herein, is demonstrated by its Request No. 15 submitted to the trial Court. In part, it provided that with respect to determination of severance damage:

> "In order for the defendant to recover such severance damages it has the burden of proving, by a preponderance of the evidence, that as of December 28, 1965, the date of service of the summons, no comparable land was available to it in the area which could be *substituted* for the land *taken or severed.* If such comparable land was available to the defendant, proximity and severance damages should total an amount representing the difference between (1) the value of the remainder before the taking and (2) the value of the remainder plus the comparable land after the taking, *less the cost of the comparable* land."

This requested charge is not only inconsistent with the "replacement rule" under the *Carlson* and *Co-op Security*

decisions (even assuming arguendo, that such rule were applicable), but it is inconsistent inter se. To begin with, the Request seeks to amalgamate the replacement doctrine within the "before and after rule" by providing that severance damage shall be the difference between the before and after values, less the cost of the "comparable land". Such flies in the face of the very theory of the rule which the State advocates is pertinent. *State Road Comm.* v. *Co-op Security* holds that if the replacement rule is applicable, severance damage in the traditional sense cannot be recovered:

> "Where there is other comparable land available to the condemnee that would accomplish the same use to which the land taken had been put — *severance damages are not available to one refusing to accept such land;*" (Emphasis added) P. 180 of 1 U. 2d.

Further, the Utah cases provide that if the replacement doctrine is relevant, the cost of acquiring the substitute land is the measure of severance damage. Request No. 15 of Plaintiff, in directing that the cost of purchase shall be deducted from the before and after values of the remainder, charges the property owner with the expense of acquiring the same. In other words, the owner, when faced with a partial-taking of his ground, should pay from his own pocket without reimbursement, the purchase price necessary to obtain replacement land. Nearly 2 acres of Style-Crete land was condemned but the State contends that the 10 acres of replacement land should be purchased by Style-Crete. If the 1.99 acre were reasonably worth

$5,000.00 and the cost of the ten acres had been $30,000.00, Instruction No. 15 would require that the $30,000.00 *be deducted from the severance damage award.* Not even the wildest stretch of the replacement rule under *Carlson* and *Co-op Security* would permit such a grotesque result. It offends not only the time honored rules of just compensation, but due process of law as well. It is not surprising that Appellant fails to cite one case in support of Request No. 15.

Requested Instruction 15 would further advise the jury that the replacement land should be "substituted for the land taken or *severed*". Such is inconsistent with the remainder of the instruction with respect to the assessment of the value of the remaining property, before and after condemnation, since the before and after values, under the State's theory of replacement, would be one and the same.

Request No. 15, which is the net result of the State's Appeal, is incongruous, ambiguous and almost incomprehensible. It is impossible of practical application, much the less consistent in theory.

POINT IV.

PLAINTIFF'S CONCEPT OF SEVERANCE DAMAGES IN EMINENT DOMAIN IS ERRONEOUSLY CONCEIVED.

The synthesis of Plaintiff's argument on severance damages is set out in pages 23 and 39, paragraph 1, of its Brief. It is urged therein that with respect to severance damage, "the owner is entitled only to an amount repre-

senting the *damage actually done* to the land * * * and suffered." And that there is "a substantial distinction between compensation for land taken and damages to property not taken". Conceivably, Plaintiff contends that there must be a physical invasion or eroding-away of the remaining property, and that severance damage is of an inferior rank to compensation payable for land taken.

Such argument, while popular some 200 years ago, has long gone by the board, particularly under the Constitution, Statutes, and case decisions in Utah. Art. I Sec. 22 in providing that "private property shall not be taken or damaged without just compensation", makes no distinction between the quality of recovery for severance damage, vis-a-vis, a taking. Neither is 78-34-10, U. C. A. 1953 discriminatory in favor of a taking and against severance damage. And this Court in a host of decisions, has used the same test for severance damage as it has for a taking, i.e., market value. *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963); *Southern Pacific* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960); *State Road Comm.* v. *Co-op Security Corp., supra; San Pedro A. L. & S. L. R. Co.* v. *Salt Lake City Board of Education,* 35 Utah 13, 99 Pac. 263 (1909).

While there may be a contest as to whether a paticular element of severance damage is compensable, once the issue is resolved in favor of compensability, the standard of compensation is market value. *Weber Basin Conserv. Dist.,* v. *Nelson,* 11 U. 2d 253, 358 P. 2d 81 (1960).

The State claims that an owner must mitigate his damage in eminent domain. But the replacement theory which

the State urges herein would not mitigate Style-Crete's severance damages. It does not, because those damages could not be cured or mitigated, as a matter of law, by the purchase of neighboring land. Adherence to the State's theory would only amplify that damage by requiring the landowner to purchase ten acres of other property at a cost of $30,000.00, which cost Style-Crete would bear. The State's entire approach to the severance damage issue is groundless.

POINT V.

THE INSTRUCTIONS OF THE TRIAL COURT PROPERLY AND FULLY CHARGED THE JURY ON THE APPLICABLE LAW.

Under Point III of Appellant's Brief, it is argued that the trial Court erred prejudicially in its charge to the jury under Instructions 4, 8, 10, 11, 12, 19, 20 and 21. The State fails to set out the entire instruction in any instance but attempts to rely on error relating to capitalization, punctuation and phrases which counsel has severed from the context. No claim of error runs to any genuine issue of substantive law and in no instance did the State request a difference charge, other than Instruction No. 15. Furthermore, while the State devotes considerable time to argument on Nos. 4, 12 and 20, it took no exception to either of those instructions at trial, (R. 937-938), so it is foreclosed of opportunity to make an initial complaint in this Court. *Pettingill* v. *Perkins,* 2 U. 2d 266, 272 P. 2d 185 (1954).

Instruction No. 4 (R. 19): Although no exception was taken to No. 4, the State's objection is typical of its failure

to recognize in this case the constitutional mandate and statutory method for assessment of damages in eminent domain. The instruction, (used time and again in the Districts of Utah, including Federal actions) charges the jury on the fundamental ordinances upon which this case rests, the Constitution. The objections of the State, i.e., that No. 4 is better reserved for a "civic's class since it directs the jury's attention away from the issues being tried," disputes the law itself as enunciated by this Court in *State Road Comm.* v. *Noble,* 6 U. 2d 40, 305 P. 2d 495 (1957):

> "Just compensation means that the owners must be put in as good a position money wise as they would have occupied had their property not been taken."

The State's theory runs aground the same view expressed by the United States Supreme Court in *U. S.* v. *Miller,* 317 U. S. 369, 87 L. Ed. 336 (1942).

Instruction No. 8 (R. 23): The State claims that this Instruction is a commentary of the Court upon the weight and effect of the evidence. In no sense is it that. The purpose of the Instruction was twofold; one, it defined clearly the factors under the evidence that could be taken into consideration in determining severance damage, and two, it presented, without comment, the theory of the landowner on severance damage. Both functions are properly the exercise of the trial Court in Utah. *Anderson* v. *Nixon,* 104 Utah 262, 139 P. 2d 216 (1943); *Morrison* v. *Perry,* 104 Utah 151, 140 P. 2d 772 (1943); *Beckstrom* v. *Williams,* 3 U. 2d 210, 282 P. 2d 309 (1955). Charge No. 8 did not suggest, expressly or impliedly, the feelings, of the trial judge,

as Instruction No. 1, had already told the jury that the court "neither forms, has or expresses any opinion or judgment" as to the issues of fact. Nor did the Instruction direct the jury to consider the factors of severance damage, the phrase, "you *may* take into account" having been used. This Court has held that each party to a law suit is entitled to have his theory submitted to the jury by an appropriate instruction if there is evidence to support it. *Webb* v. *Snow,* 102 Utah 435, 132 P. 2d 114 (1942).

Instruction No. 10 (R. 25) : Charges that the value of the remaining property of Style-Crete after the condemnation acquisition, should be considered as one property although in three separate parts. Plaintiff claims that it cannot find "any support in the cases for the proposition". If *State of Utah* v. *Tedesco,* 4 U. 2d 248, 291 P. 2d 1028 (1956) is not sufficient support, *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953), *State Road Comm.* v. *Noble,* 8 U. 2d 405, 335 P. 2d 831 (1959) and *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963) should be. They all state that the property is to be evaluated in its then existent condition with the test being what one buyer would pay to one seller, and not what three or more buyers may pay to one seller. The test is as applicable to the *after* value as it is to the *before* value and the decisions have never carved out a distinction between the two in the approach to value. The State's plea that Instruction No. 10 could result in an owner realizing a "profit" on the sale of the remaining property is unworthy of comment. The Instruction properly states the law of the case.

Instruction No. 11 (R. 26), defines a comparable sale, in the legal sense, under the decisions of this Court in *State* v. *Peek, supra, Southern Pacific* v. *Arthur, supra, Weber Basin Conserv. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862 (1959) and *State Road Comm.* v. *Peterson, supra.* It is an instruction originally drafted by the Office of the Attorney General in 1959, it has been used by the Road Commission and landowners alike in the bulk of condemnation litigation in the last eight years, and it is now considered a stock instruction by most trial judges in this State. It does not at all charge the jury to weigh any particular sale or one sale against another. Instead, it defines the rudiments of a comparable transaction of which the trial Court has the responsibility. It is of no difference than charging the jury on the elements of the "reasonable prudent man" in a negligence suit.

Instruction No. 12 (R. 27): The single exception of the State is to the use of the words "fairly and reasonably" in the Instruction. There is no merit to the objection. Having taken no exception at all to the Instruction in the trial Court, the State may not be heard on the objection for the first time on appeal. *Patton* v. *Evans,* 92 Utah 524, 69 P. 2d 969 (1937).

Instruction No. 19 (R. 34), of which the State "laments", is of stock variety and has been used over again in eminent domain trials in this State. It charges that an owner may not stand in the way of a Government improvement by refusing to sell his property. That is a correct statement of the law. *Barnes* v. *Wade,* 90 Utah 1, 58 P. 2d 297 (1936). The statement that the owner is to

be paid "justly and fairly" for the condemned property needs no citation. The best that State's counsel can do with this charge is to say that it was "inflammatory, loaded" and contained unnecessary capitalization of words. The objection is against this Court's definition of just compensation and is unworthy of belief. Significantly, Plaintiff does not refer the Court to a case in point that would justify a finding of prejudicial error.

Instruction No. 21 (R. 36): This Instruction advised the jury that its verdict may be within the range of the testimony submitted by the parties as the weight of the evidence fairly reflects. State counsel argues that while the charge "is not particularly harmful", this Court should nevertheless reverse and declare that in an eminent domain case, a verdict may exceed or be less than the testimony of the parties on land value and damages, all dependent upon the whims of the jury. Such contention ignores the rule of this Court announced in *Weber Basin Conserv. Dist.* v. *Moore,* 2 U. 2d 254, 272 P. 2d 176 (1954), *Weber Basin Conserv. Dist.* v. *Skeen,* 8 U. 2d 79, 328 P. 2d 730 (1958) and *Porcupine Reservoir Co.* v. *Keller Corp.,* 15 U. 2d 318, 392 P. 2d 620 (1964). In *Skeen,* the Court remitted a jury verdict on severance damages which exceeded the expert testimony of the landowner. Under the theory of State's counsel herein, the *Skeen* case was decided improperly by this Court. Instruction No. 21 accurately presents the rule of the case.

POINT VI.

THE TRIAL COURT WAS NOT IN ERROR IN EXCLUDING THE WRITTEN APPRAISAL REPORT OF THE STATE'S VALUE WITNESS, SOLOMON.

The claim of the State in Point IV of its Brief, page 37, that the trial Court erroneously excluded an offer of the written appraisal report of the State value witness, Mr. Solomon, is ludicrous. It is elementary trial practice in this jurisdiction that a written report of an appraisal witness is not evidence of the facts in issue and while the report may be referred to by the witness to refresh his memory, it may not be admitted in evidence. Such is the general evidentiary rule, *U. S.* v. *Rappy,* 157 F. 2d 964 (2d Cir. 1946); 5 *Nichols on Eminent Domain,* 129 Sec. 18.1(1). The State suggests that because counsel for Style-Crete on cross examination, requested to see the *notes* of the State appraiser and thereafter proceeded with cross examination as to the witness' opinion given on direct, that the door is thus opened for the admissibility of an entire written appraisal report on redirect examination. If that were the rule, it would be difficult if not impossible to conduct a cross examination of an appraiser without having his written report (prepared outside of the courtroom and containing all sorts of inadmissible statements and conclusions) received in evidence on redirect.

State's counsel on redirect examination of Mr. Solomon, offered his entire appraisal report as Exhibit P-33, although cross examination had only touched upon a frac-

tion of its contents. The objection was made that the report was not the best evidence of the witness' opinion, that the proffer constituted an emphasis of a particular part of the witness' testimony, that the State had already submitted a large written sheet showing the computations and value conclusions of the witness and that Defendant's counsel had not, by requesting to see the notes of the witness on cross examination, placed in issue the evidential significance of the notes (R. 845-846). The objection was properly sustained by the trial judge.

POINT VII.

THE POSITION OF THE STATE ON APPEAL AND AT TRIAL IS INCONSISTENT WITH ITS OWN TESTIMONY BY WHICH IT IS BOUND.

The State has not challenged the sufficiency of the evidence to support the verdict. The verdict and judgment are substantially supported by the predominate weight of the evidence. In fact, much of the State's testimony corroborated that of Style-Crete.

Part of the State's difficulty at trial lay in its misinterpretation of Style-Crete's proof of damages. With respect to the vibration testimony, for example, Style-Crete introduced evidence as to the probable effects upon the building from the vibration of high speed trains. The purpose of that evidence was not to show the existence of actual vibration in connection with a business loss, but to show an important condition probably resulting from condemnation which would affect the thinking of the buyer and

seller as to the market value of the remaining property. Yet from the approach of the State to Style-Crete's vibration testimony and, indeed from the Commission's own evidence, it is apparent that the State thought it was trying a damage vibration case against a railroad and that the triable issue was whether there was, in fact, actual and sustained vibration damage. The State's approach overlooked the fact that market value and not vibration was the ultimate and triable issue.

Further, Mr. Solomon, the State's only value witness, stated unequivocally that the remaining property and building would be depreciated in value due to the (a) location of the nine foot railroad and highway fill in front and along side of the building, (b) the trapping of normal run off water by the fill, (c) taking of the septic tank drainage field, (d) loss of parking space, (e) loss of visibility, (f) impairment of access and (g) loss of special features of the plant itself (R. 726-729). He further testified that in his opinion, the vibration from the railroad would likely have a detrimental effect on the value of the remaining property so that it could no longer be used for cast stone or close tolerance manufacturing. The State thereafter, attempted to impeach Mr. Solomon's testimony through the use of two other witnesses, Messrs. Pickett and Wilde. Pickett had experience only in massive concrete structures such as bridges, and none in cast stone (R. 863-864). Wilde admitted that after cast stone once has set up, vibration thereafter would weaken the product (R. 855).

In closing argument to the jury, counsel for the State argued in substance that:

> "Mr. Solomon did a conscientious job and he tried to be very fair to the defendant, but in view of the fact that he based his opinion of after value on some assumptions as to vibrations which are not correct, even his appraisal of the value of the property after the taking was too low. I believe you would be justified in disregarding his erroneous assumptions which were favorable to the defendant and find that the value of the property after the taking was considerably greater than what he considered it to be, and that the damages suffered by the defendant were substantially less than the figure stated in the opinion given by Mr. Solomon."

(R. 920-923).[6]

It seems rather ironic that the State would call as its only expert on value, a witness who followed the State's instructions to appraise the property under the "before and after rule" only to have State's counsel impeach and discredit his testimony on closing argument. Certainly it is inconsistent with what this Court said in *Weber Basin Conserv. Dist.* v. *Skeen,* 8 U. 2d 79, 328 P. 2d 730 (1958):

> "A party cannot call a witness to testify and then select only that testimony favorable to his cause, ignoring that which is unfavorable."

The verdict and judgment stand fully supported by the evidence.

CONCLUSION

While the facts in this case presented serious issues of substantial dispute, the questions of law were relatively un-

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[6]At the hearing on the State's motion for new trial, the undisputed affidavit set forth above was stricken, but the affidavit should be considered in weighing the merits of the State's Appeal herein.

complicated for an eminent domain suit, until the State raised the replcement land theory of severance damage. There is no room for that theory under the facts of this case and to hold otherwise, would be to upset the precedent developed in this jurisdiction of the last thirty years or more. The ruling of the trial Court rejecting the replacement theory of severance damage should be upheld by this Court. The general rule of the *before* and *after* is the only principle which fits the facts of this case.

The objections of the State to the trial Court's charge to the jury are unwarranted and contrary to the decisions of this Court. The trial Court gave all of the State's Requests for instructions except No. 15 on the irrelevant theory of "replacement land".

A just and fair verdict was returned after eight days of trial fully supported by the evidence. The judgment of just compensation entered on the verdict should be affirmed and the Plaintiff's motion for a new trial should be denied.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.,
520 Kearns Building,
Salt Lake City, Utah,

PAUL E. REIMANN,
500 Kennecott Building,
Salt Lake City, Utah,

Attorneys for Respondent,
Style Crete, Inc.

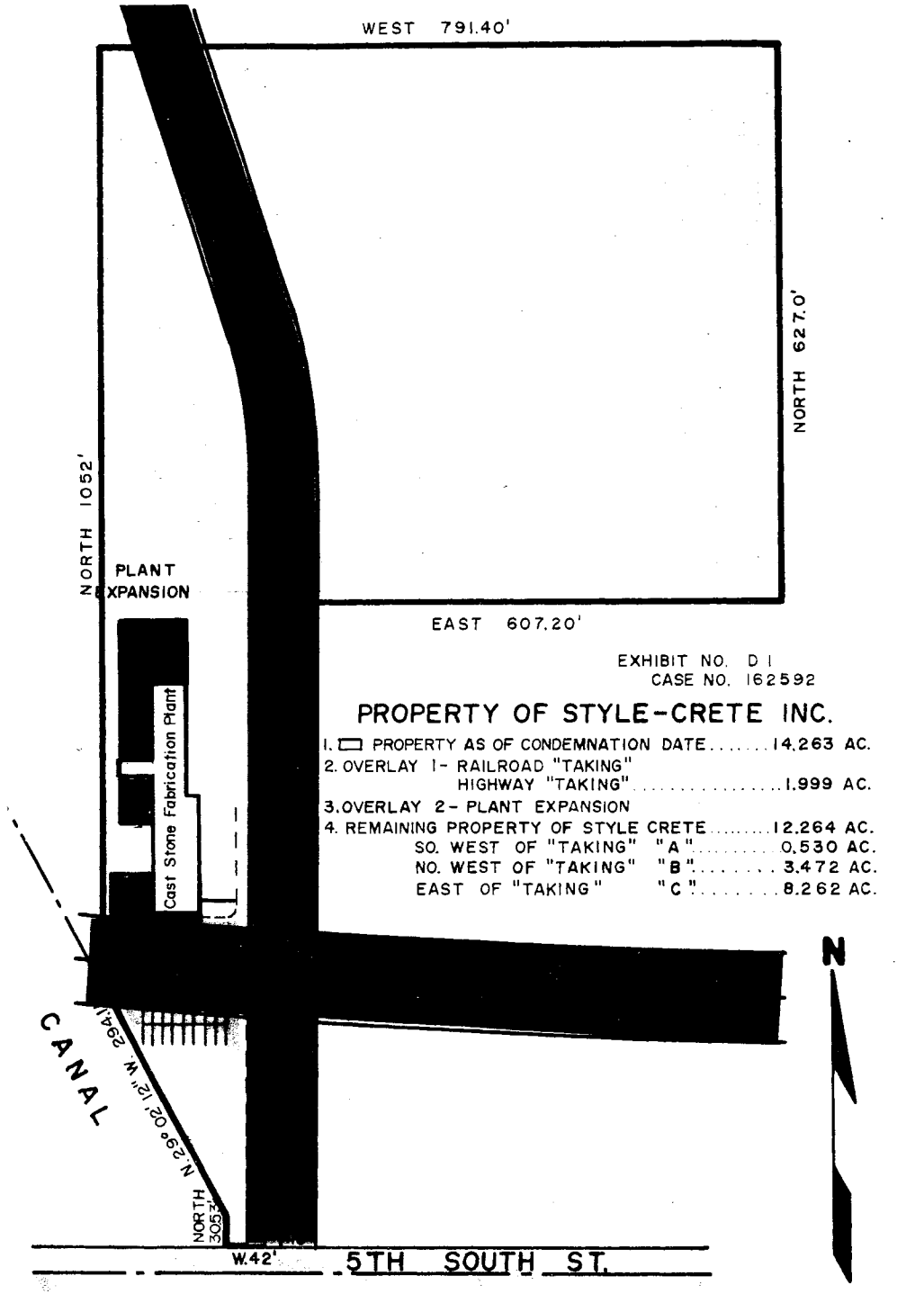

EXHIBIT NO. D I
CASE NO. 162592

PROPERTY OF STYLE-CRETE INC.

1. ▭ PROPERTY AS OF CONDEMNATION DATE	14.263 AC.
2. OVERLAY 1- RAILROAD "TAKING"	
HIGHWAY "TAKING"	1.999 AC.
3. OVERLAY 2- PLANT EXPANSION	
4. REMAINING PROPERTY OF STYLE CRETE	12.264 AC.
SO. WEST OF "TAKING" "A"	0.530 AC.
NO. WEST OF "TAKING" "B"	3.472 AC.
EAST OF "TAKING" "C"	8.262 AC.